



IN THE
Supreme Court of the United States
October Term, 1979.

No. 79-410

DONALD SCHANBARGER,

Petitioner,

vs.

MARINE MIDLAND BANK (Executor of the HARRIET HENDRY ESTATE),

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS.

(Entitled by Petitioner as "Petition for a Writ of Certiorari to the Fourth Department Appellate Division of the New York Supreme Court.")

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

Opinion.

The only opinion was that delivered by Surrogate's Court, Herkimer County, State of New York—the court of original jurisdiction. It is not officially reported but is appended to the Petition for a Writ of Certiorari (pp. A. 1 to A. 34).

Jurisdiction.

The jurisdiction of this Court is invoked by petitioner under 28 U.S.C. 1257 (3).

Question Presented.

Petitioner's Statement of the Cases and Issues Presented require re-framing of the question presented to read as follows:

Where a corporate fiduciary brings on a proceeding for judicial settlement of its account as Executor of a Will and petitioner, as a legatee, under the Will and party to the proceeding, presents a list of objections to the account which present non-federal issues for determination by the State Court, and after the hearing thereon presents a federal issue of claimed deprivation of petitioner's Federal constitutional rights without requesting a hearing or argument thereon, which issue, in substance, is presented for purposes of an appeal, is the State court judgment supported by adequate non-federal grounds so as to require denial of the application for a writ of certiorari?

Constitutional Provisions Involved.

United States Constitution:

Tenth Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Fourteenth Amendment:

"Section I * * *; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case.

The statement of petitioner was prepared in disregard of the applicable principles of review that the federal questions sought to be reviewed were necessarily involved in the case; that they were properly presented to the State Court in accordance with State practice and lastly, whether the State Court judgment sought to be reviewed is supported by adequate nonfederal grounds.

Respondent, Marine Midland Bank, was appointed Executor of the Will of testatrix on September 18, 1973. In June, 1975 the Executor brought a proceeding to settle its final account. Petitioner, Donald Schanbarger, one of the legatees, appeared in the proceeding and filed objections to the account (P. 6-7).* The objections were dismissed by the Surrogate and a Decree of Judicial Settlement of the account was duly entered on April 23, 1976 (P. 7; A. 1).*

Petitioner appealed to the Appellate Division, Supreme Court of New York, Fourth Department, which unanimously affirmed the decree (A. 1-2).

Petitioner then applied to the New York Court of Appeals for leave to appeal, which was denied by that Court by order entered March 29, 1977 (A. 2).

*References "P" are to pages of the Petition for a Writ of Certiorari, and references "A" are to the appendix submitted with the Petition.

Petitioner then filed a petition to this Court for a Writ of Certiorari to review the proceedings in the New York Courts which application (No. 77-197) was denied on October 3, 1977 (P. 8; A. 2).

Petitioner's statement of Facts of the Case at pages 6 through 8 of his Petition relate to the first or original account for judicial settlement in Surrogate's Court and the subsequent appeals.

In March, 1978 the Executor filed a Supplemental Account reporting additional income, seeking approval of expenses incurred by the Estate and allowances for counsel in defending petitioner's various appeals, and in effect updating its accounting (A. 35). Petitioner filed thirteen objections to this supplemental accounting on April 11, 1978 (P. 9; A. 37). These objections were heard on April 25 and May 25, 1978 (A. 5 and 7). The Surrogate overruled and dismissed all of the objections of petitioner (Opinion A. 1-28; Decree A. 39).

Three so-called "constitutional questions" were filed as a separate instrument with the Surrogate on June 2, 1978 (A. 27), designated as "Questions Presented" (P. 3). The Surrogate's Court found and determined that there had been no violation of the constitutional rights of petitioner under the Tenth and Fourteenth Amendments to the Constitution (A. 27, 40).

Petitioner's statement of the facts concerning the 1978 Supplemental Accounting before the Surrogate appear in the Petition at pages 8 through 14.

Petitioner appealed to the Appellate Division, Supreme Court of New York, Fourth Judicial Department, from the Decree of the Surrogate's Court entered September

14, 1978 approving the Supplemental Account. The Appellate Division unanimously affirmed the Decree by order entered April 13, 1979 (A. 58). Petitioner appealed to the Court of Appeals of the State of New York and such appeal was dismissed by that Court by order made and entered on June 14, 1979, "upon the grounds that no substantial constitutional question is directly involved" (A. 60).

ARGUMENT.

A.

The Federal question asserted by petitioner is not presented by the record.

Newsome v. Smyth, 365 U. S. 604, 81 S. Ct. 774, 5 L. Ed. 2d 803;
Sutter v. Midland Valley R. Co., 280 U. S. 521, 50 S. Ct. 65, 74 L. Ed. 590;
Mellon v. McKinley, 275 U. S. 492, 48 S. Ct. 34, 72 L. Ed. 390;
Erie Railroad Co. v. Kirkendall, 266 U. S. 185, 45 S. Ct. 33, 69 L. Ed. 236.

These decisions support the well recognized principle that the grounds presented in a petition for certiorari must have a solid basis in the record and that the federal questions were necessarily involved in the case. The record herein demonstrates that such proof is absent therefrom.

Petitioner did not assert any Federal constitutional questions in his list of objections heard, passed upon and dismissed by the Surrogate. Petitioner, apparently

with knowledge that a Federal issue could not be raised for the first time in this Court (*Tacon v. State of Arizona*, 410 U. S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346), carefully asserted the Federal constitutional questions in an instrument entitled "Presented Questions" filed with the Surrogate on June 2, 1978 (A. 27) after the hearing on his objections had been concluded. Petitioner presented no argument or discussion and did not ask for a hearing on the "Presented Questions." Petitioner made no effort to show in what way his constitutional rights were violated by the proceedings. It would appear that the questions presented were filed only for the purposes of an appeal.

The result is that not only was the Federal question not properly presented for the State Court to pass thereon but, it is submitted, the procedure is shown to have been a device for the purpose of the present application.

Petitioner's constitutional question No. 1 is whether the lower Court's "approval of expenses of the estate" violates the Tenth and Fourteenth Amendments of the United States Constitution. This issue involved determination by the Surrogate whether the expenses, fees, and disbursements claimed were authorized by New York statutory law and were reasonably necessary, and whether the amounts claimed were reasonable. No constitutional issue was involved, directly or indirectly.

Petitioner's constitutional question No. 2 is that "failure of the New York State Judiciary to take full evidence as to all activity of the executor" violates the Tenth and Fourteenth Amendments to the United States Constitution. This issue relates to the admission or rejection of evidence at the hearing on the objections before the lower Court, and not the construction or application of any constitutional provision.

Question No. 3 is interpreted to be an allegation by the petitioner that the Surrogate's signing of the Decree for Supplemental Judicial Settlement entered September 14, 1978, had the effect of modifying the original Decree for Judicial Settlement entered April 23, 1976, in the first proceeding without the showing of any fraud. Petitioner has failed to show that this issue in any way asserted a Federal constitutional question.

B.

Assuming that a Federal Question was presented it was insubstantial.

Under the provisions of both Section 1257 (3) of the Judicial Code (28 U.S.C. §1257 [3]) and Rule 19 of the Supreme Court Rules, the authority of this court to review a state court judgment on certiorari depends on the existence of a substantial federal question. Moreover, Rule 19 indicates that regardless of whether the court below is a state court or a federal court there must be "special and important reasons" for granting a writ of certiorari.

These principles have been implemented not only in denying applications for writs but in dismissing writs as improvidently granted.

McClanahan v. Moraver & Hartzell, 404 U. S. 16, 92 S. Ct. 170, 30 L. Ed. 2d 136;
Palmieri v. State of Florida, 393 U. S. 218, 89 S. Ct. 440, 21 L. Ed. 2d 389;
Benz v. New York State Thruway Authority, 369 U. S. 147, 82 S. Ct. 674, 7 L. Ed. 2d 634;
Honeyman v. Hanan, 302 U. S. 375, 58 S. Ct. 273, 82 L. Ed. 312.

C.

The State Court judgment sought to be reviewed is supported by adequate non-federal grounds.

Where the decision of a State Court is based on both federal and non-federal grounds, there is no opportunity for review by this Court if the non-federal grounds are themselves adequate to support the judgment.

Harris v. Zion's Savings Bank & T. Co., 313 U. S. 541, 61 S. Ct. 840, 85 L. Ed. 1509;
Utilities Insurance Co. v. Potter, 312 U. S. 662, 61 S. Ct. 804, 85 L. Ed. 1109;
Johnson v. Thornburgh, 276 U. S. 601, 48 S. Ct. 322, 72 L. Ed. 725;
George O. Richardson Machinery Co. v. Scott, 276 U. S. 128, 48 S. Ct. 264, 72 L. Ed. 497.

There was presented herein to the State Court a routine application by an Executor for a Supplemental Judicial Settlement of its account. Petitioner, as a legatee, appeared and filed objections to the account. Petitioner examined witnesses and various hearings were held concerning the objections. Petitioner was given every opportunity to submit his proof and substantiate his objections. The Surrogate in a lengthy and carefully reasoned opinion dismissed all of the objections and found that there had been no violations of petitioner's constitutional rights in connection with the administration of the estate, in the proceedings for Supplemental Accounting, or by the Decree. The Appellate Division, Fourth Department, on appeal, unanimously affirmed the Decree. The Court of Appeals of the State of New York dismissed an appeal on the ground that no substantial constitutional question was directly involved.

Petitioner has had his day in Court and the grant of a writ of certiorari herein would, in substance, present to this Court only the correctness of the judgment of the State Court based upon non-federal grounds.

CONCLUSION.

For the foregoing reasons, respondent says that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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